

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

BROADCAST MUSIC INC,
a corporation, et al.

Plaintiffs,

v.

FOURTH QUARTER INC d/b/a/
SKY BAR CAFÉ, PATRICK J. GRIDER
AND DANIEL GRIDER EACH
INDIVIDUALLY

Defendants.

Case No. 3:07CV921-MRT

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Come now the Defendants, Fourth Quarter, Inc. d/b/a/ Skybar Café (hereinafter referred to as Skybar Café), Patrick J. Grider, and Daniel Grider by and through their undersigned attorneys of record and in support of its motion to dismiss submits the following:

INTRODUCTION

On or about the 12th day of October, 2007, Plaintiff filed its Complaint in the United States District Court for the Middle District of Alabama against Skybar Café, Patrick J. Grider and Daniel Grider. In said Complaint, Plaintiff alleges a cause of action against Skybar Café, Patrick J. Grider and Daniel Grider for twenty claims of copyright infringement. On the 1st day of November, 2007, Defendants filed their motion to dismiss the copyright infringement claim. Pursuant to Rule 12(b)(6), FED. R. Civ. P., Plaintiff's cause of action for copyright infringement, is due to be dismissed for failure to state a claim upon which relief can be granted.

STANDARD OF REVIEW

“Factual allegations of the plaintiff’s complaint are accepted as true for the purposes of a motion to dismiss. The motion must be denied unless it is clear that the plaintiff can prove no set of the facts in support of the claims in the complaint.” S. Fla. Water Mgmt. Dist. v. v. Montalva, 84 F.3d 402, 406 (11th Cir. 1996).

ARGUMENT

COPYRIGHT INFRINGEMENT

17 U.S.C. § 501(b) provides in part: “The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it.” The Plaintiff Broadcast Music, Inc is not the exclusive licensor of all the works claimed infringed contained within said complaint.

17 U.S.C. § 107 provides in part: “In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” The Plaintiffs have not established the alleged use upon the potential market for or value of the copyrighted work.

The parody of copyrighted works comes within the protection of the “fair use” as described in Title 17 U.S.C. 107. “The germ of parody lies in the definition of the Greek *parodeia* ... as “a song sung alongside another.” Campbell v. Acuff-Rose Music, Inc.,

510 U.S. 569, 580 (1994). The Plaintiffs have not established the alleged of the copyrighted work was not parody.

CONCLUSION

The copyright infringement cause of action as set forth in Plaintiff's complaint is due to be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted this the 1st day of November, 2007.

WHITTELSEY, WHITTELSEY & POOLE, P.C.

/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon the following individuals, by hand delivering a copy or by placing it in the United State mail, postage prepaid, at their correct addresses this the 1st day of November, 2007.

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